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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-1535

CALVIN L. PARKER, et al.,

Petitioners

v.

CONNORS STEEL COMPANY, H. K. PORTER COMPANY, INC.; AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Harry L. Hopkins
Duncan B. Blair
Counsel of Record

OF COUNSEL:

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QUESTION PRESENTED FOR REVIEW

1. Whether a district court's knowledge of a possible violation of 28 U.S.C. § 455 requires reversal of a summary judgment order, which order is affirmed on the merits upon plenary review, where there is no risk of injustice to the parties, no risk that the denial of relief will produce injustice in other cases, and no risk of undermining the public's confidence in the judicial process.

2. Whether a law clerk can "become the judge" under 28 U.S.C. § 455(b)(5)(iii), where the statute itself makes no such provision and the case law decided thereunder does not support such a proposition.

3. Whether §§ 7 and 8 of the National Labor Relations Act preempt state law fraud

claims based on representations made by an employer in collective bargaining.

4. Whether the arbitrator's award bars plaintiffs' state law fraud claims.

5. Whether the district court correctly granted summary judgment on plaintiffs' hybrid § 301/fair representation claims.

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STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 455, 28 U.S.C. § 2111, Sections 7 and 8

of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158, and Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

STATEMENT OF THE CASE

This lawsuit arises out of the closing of a steel plant in Birmingham, Alabama because of continued losses suffered by the plant in the early 1980's. Connors Steel Company, a wholly owned subsidiary of H. K. Porter, Inc. (Connors and Porter are collectively referred to as the "Company"), was primarily a producer of reinforcing steel bars. Largely as a result of increased competition from "mini-mills" in the reinforcing steel market, Connors' Birmingham facility suffered $1,594,000.00 in losses during the first five months of 1982.

In June 1982, Connors' representatives met with a representative of the United Steelworkers of America (the "Union") to consider Connors' proposals for relief from certain economic and

benefit provisions of the 1980 collective bargaining agreement between Connors and the Union. During the meeting, the Connors' representatives stressed the amounts of the 1982 monthly losses; the negative economic forecast for the remainder of 1982; the need for immediate relief; and their belief that, absent relief, the Birmingham plant would have to shut down.

A second meeting was held between Connors and the Union, at which the Union reviewed Connors' financial records. The two parties subsequently negotiated the terms of a concession agreement, during which the Union insisted on two points. First, any economic concessions would have to be paid to employees if Connors became profitable. Second, no concessions would be granted with respect to

the pension and insurance provisions of the 1980 agreement.

The concession agreement which resulted from these negotiations suspended certain wage and benefit increases that were scheduled to go into effect on September 1, 1982; reduced wages by 20%; reduced certain other benefits; and provided for complete repayment of all wage and benefit concessions if Connors returned to profitability. The Union recommended the concession package to its membership, and the members subsequently approved the concession agreement.

Notwithstanding the relief obtained under the 1982 concession agreement, monthly losses at Connors continued to mount. By the end of 1982, Connors' yearly losses exceeded $9,000,000.00. The president of Porter told Connors'

management that the Birmingham plant would have to immediately achieve break-even performance or face the possibility of a shutdown. Connors and the Union thereupon negotiated a second concession agreement which provided that hourly employees would forego supplemental employment concessions, certain savings and vacation benefits, Sunday premiums, certain shift differentials, certain vision and dental benefits, and would reduce their hourly wage scale by 20%. The agreement also provided for complete restoration of all wage and benefit concessions if Connors returned to profitability. The Union recommended the second concession agreement, and the agreement was ratified by the membership.

Based upon certain recommendations made by Mr. Graham Brown, an independent consultant, Porter invested over

$1,000,000.00 into Connors to begin production of a higher quality, more profitable bar steel. These expenditures were intended to bring Connors to a break-even point of production. Despite these expenditures and the relief obtained from the second concession agreement, Connors lost $4,791,000.00 from January to August 1983.

Because the 1980 collective bargaining agreement was due to expire on September 1, 1983, Connors and the Union began negotiating a new agreement. Connors' final proposal for a new agreement was rejected by the union membership on August 3, 1983. On August 9, 1983, Connors gave notice to the Union that operations at the Birmingham plant would cease on September 1, 1983. The agreement was submitted a second time to

the employees, and for the second time was rejected.

In October 1983, Connors and the Union commenced negotiations on the effects of the plant closing. Because the Union objected to the manner in which Connors intended to compensate employees for benefits under the 1980 collective bargaining agreement and the two concessions agreements, the parties agreed, pursuant to the grievance and arbitration provisions of the 1980 agreement, to submit all differences arising out of the plant closing to an arbitrator for resolution. Subsequently, the hourly employees prepared seven grievances complaining that regular and vacation pay had not been fully paid; that all employees at closing were entitled to layoff status and the benefits flowing therefrom; and that

employees should be paid the value of benefits given up in the 1982 and 1983 concession agreements. These issues, along with issues that Connors and the Union had already agreed to arbitrate, were submitted to arbitration.

Prior to the arbitration hearing, plaintiffs filed two unfair labor practice charges with the National Labor Relations Board. The charge against Connors alleged Connors had bargained in bad faith in violation of Section 8(a)(5) of the National Labor Relations Act. The charge against the Union alleged the Union had violated its duty of fair representation under Section 8(b) of the Act. Shortly after the charges were filed the NLRB advised plaintiffs' counsel that the charges had been fully investigated and considered but that further proceedings were neither

warranted nor permissible because the charges had not been filed within the six-month limitations period of Section 10(b). A subsequent appeal of the dismissals was denied by the NLRB's general counsel.

Plaintiffs then filed this lawsuit in Alabama state court alleging (1) various breaches of the Union's duty of fair representation; (2) breach of the collective bargaining agreement and the two concession agreements by Connors; and (3) fraud and bad faith against the Company in negotiating and inducing the employees to ratify the two concession agreements. The case was removed to federal court.

Following removal, the arbitration hearing took place. The arbitrator issued an award deciding two of the several issues in favor of the Union.

Pursuant to the award, Connors issued checks totalling $243,932.66 to 586 former bargaining unit members of Connors.

On July 31, 1987, the district court granted summary judgment in favor of defendants. More than two years prior to this order, the district court judge, Judge Seybourn H. Lynne, announced his tentative opinion that defendants were entitled to summary judgment (R-87, p. 5 n. 2). However, at plaintiffs' request, the court withheld action on summary judgment until discovery was completed.[1] At the time summary judgment was entered, Judge Lynne's law clerk was William G. Somerville, III, the son of a senior partner in the law firm representing the

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[1] It is undisputed William G. Somerville, III was not Judge Lynne's law clerk at the time of this announcement.

Company.[2] Prior to the issuance of the order, Somerville held a conference with counsel to review previously briefed legal positions of the parties.[3] In his summary judgment opinion, Judge Lynne credited his clerk with assistance in the formulation of the opinion, reviewing the record, and discussing with the judge "how the law should be applied to the material facts as to which there is no genuine issue."[4] (R-87, p. 5).

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[2] William G. Somerville, III's father, William G. Somerville, Jr., was a former law clerk to Judge Lynne.

[3] Although characterized by petitioners and the Eleventh Circuit as a "hearing", this meeting was northing more than a conference to familiarize the law clerk with the legal issues presented by the lawsuit and with the positions and theories held by the parties.

[4] Petitioners claim the law clerk himself determined whether there were material issues of fact (Petition for Certiorari, p. 11). The passage from Judge Lynne's memorandum opinion cited by petitioners in support of this allegation makes it clear Somerville did not himself determine if there were issues of material fact, but instead discussed with the

Following the issuance of the order, petitioners filed a motion to recuse under 28 U.S.C. § 455(a) and (b). This motion was denied by the district judge.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit's Opinion that Reversal is not Automatically Required When a Judge Has Knowledge of Facts Which May Require Recusal Under 28 U.S.C. § 455 Conforms With the Opinions of this Court, Opinions from Other Circuit Courts of Appeal, and Federal Statutory Law.

In Liljeberg v. Health Services Acquisition Corp., 468 U.S. ____, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), this Court squarely held the doctrine of harmless error is applicable to judgments rendered by judges who, in violation of 28 U.S.C. § 455, have presided over actions in which their impartiality might

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Court how the law should be applied to undisputed facts.

reasonably be questioned. The Eleventh Circuit's opinion below is consistent not only with this holding, but also with the legal principles expressed in the opinion. Moreover, the Eleventh Circuit opinion is consistent with opinions issued by other circuit courts of appeal. Petitioners have wholly failed to demonstrate a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision, and this petition should be denied.

Under 28 U.S.C. § 455(a), a judge shall recuse himself under the following circumstances:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The statute (reproduced in its entirety in the appendix to the petition for a writ of certiorari) does not provide a remedy for violation of the duty to recuse. In Liljeberg v. Health Services Acquisition Corp., 468 U.S. ____, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), one of the issues before this Court was the type of relief available under the statute. Declining to follow the Fifth Circuit's determination that reversal and/or vacatur is always required where a judge has constructive knowledge of a violation of the statute, the Court stated:

> A conclusion that a statutory violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a).

108 S.Ct. at 2203. In coming to this conclusion, the Court noted that § 455 does not, on its own, authorize the reopening of closed litigation. Id. Although a motion to vacate a judgment may be filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the Court stated judgments may be vacated "whenever such action is appropriate to accomplish justice," citing Klapprott v. United States, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949), but that such action should be applied only in "extraordinary circumstances," citing Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950). Id. at 2204. Thus, the Court concluded:

> Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455 violations. We conclude that

> in determining whether a judgment should be vacated for violation of § 455, it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Id.

Although the appeal below did not come before the Eleventh Circuit on a Rule 60(b)(6) motion, the principles enunciated in Liljeberg nevertheless apply. The circuit court below correctly determined that, under the three Liljeberg factors, Judge Lynne's refusal to recuse himself constituted harmless error and declined to reverse the summary judgment order. First, the court concluded that there was no risk of injustice to the parties involved if relief was denied. Because the appellate

court affirmed the district court's grant of summary judgment upon plenary review, the risk of injustice to petitioners in this case was slight, particularly in view of the fact the district court had announced its tentative decision to grant defendants' motion for summary judgment prior to Somerville's joining his staff. Second, the court determined that denying relief in this case would not produce injustice in other cases. Finally, the court concluded that the public's confidence would not be undermined because reversal of a correct summary judgment order, only to be reentered by some other judge, would more likely undermine public confidence.

The Eleventh Circuit also concluded that the harmless error doctrine is

applicable to 28 U.S.C. § 455(b).[5] As stated by the appellate court, this conclusion is supported by the absence of any distinction drawn between § 455(a) and (b) by this Court in Liljeberg in outlining the test for determining whether a judgment should be vacated due to a violation of the statute. In addition, stated the court, this Court demonstrated its intention that the test be applied to all § 455 violations by the following statement: "Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455 violations." (emphasis added by appellate court)

The Eleventh Circuit's ruling below is not only consistent with the opinion in Liljeberg but also with past opinions

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[5] The Eleventh Circuit did not reach the question of whether a § 455(b)(5)(iii) violation occurred in the district court.

of that court and with the opinions of other circuit courts. Under these opinions, failure to recuse does not mandate reversal or vacatur where the same conclusion on the merits is reached by the reviewing court. See Lyons v. Sheetz, 834 F.2d 493, 495 n. 1 (5th Cir. 1987) (even if the judged should have disqualified himself for impartiality, failure to do so is harmless error where no other judge could reasonably have reached a different result on the merits); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986) (reversal of a summary judgment order is not required where the order is subject to de novo review; in such a case, the district court is not called upon to resolve conflicts in evidence, weigh the credibility of witnesses, or exercise judicial discretion); see also Barry v.

United States, 528 F.2d 1094, 1100 (7th Cir. 1976), cert. denied, 429 U.S. 826 (1976) (any error in the judge's failure to disqualify himself was harmless where, at the end of trial, defendants stated to the judge he had been impeccably fair and just, and where his ruling of law on one point was the same as that reached independently by the appellate court).

The Seventh Circuit, although utilizing a different approach, has also concluded that violations of § 455 do not mandate reversal or vacatur. In United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 106 S.Ct. 1188 (1986), the court determined that, where § 455(a) was violated, the disqualification ran only from the time the motion to recuse was filed. Stating that "the appearance of impropriety is not enough to poison the prior acts," the

court held judicial action taken before the motion may not be set aside unless the movant shows actual impropriety or actual prejudice. Id. at 1541. See also Falconer v. Meehan, 804 F.2d 72, 78 (7th Cir. 1986) (even if recusal is found to be mandated under § 455(a), only action taken after the motion is filed must be set aside); United States v. Widgery, 778 F.2d 325, 327-28 (7th Cir. 1985) (even a successful motion to recuse does not vitiate action taken before the filing of the motion).

Finally, the Eleventh Circuit's opinion is consistent with 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.") and cases

decided under that statute. See e.g., Chapman v. State of California, 386 U.S. 18, 22, 87 S.Ct. 125, 127, 17 L.Ed.2d 705 (1967) (where constitutional error is harmless, automatic reversal is not required; the Court declined to adopt the rule that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful).[6]

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[6] The cases cited by petitioners in support of their arguments pertaining to 28 U.S.C. § 455(b)(5)(iii) do not support their arguments concerning either § 455(a) or (b). Because the opinions were decided prior to Liljeberg, those courts did not address the issue of harmless error or apply the three Liljeberg factors in determining the appropriate remedy for § 455 violations. Nor did any of those cases involve appeals from orders granting summary judgment, and the issue of harmless error in the context of plenary review did not arise. Moreover, the language in those cases to the effect that under § 455 recusal is mandatory and reversal or vacatur is always required is rendered suspect in light of this Court's holding in Liljeberg that remedies for violations of § 455 are to be fashioned according to certain guidelines.

Petitioners have failed to demonstrate any basis for granting their petition for a writ of certiorari. The Eleventh Circuit opinion below is consistent with the principles announced by this Court, with the opinions issued by other circuit courts of appeal, and with federal statutory law. The Eleventh Circuit correctly applied the holding in Liljeberg that remedies for § 455 violations are to be fashioned according to the facts and circumstances of each case, and the opinion below should not be reviewed.

II. Petitioners' Baseless Assertion that "The Law Clerk Became the Judge" in Violation of 28 U.S.C. § 455(b)(5)(iii) is Without Evidentiary Foundation and is not Worthy of this Court's Attention.

Petitioners argue that Judge Lynne's law clerk "became the judge" in direct violation of § 455(b)(5)(iii) by virtue

of his analysis of the evidence in the record, his assistance in the formulation of the summary judgment opinion, and his participation in a "hearing" held in Judge Lynne's absence during which the parties discussed their legal positions. Petitioners cite no legal authority for this proposition. Section 455(b)(5)(iii) sets forth very specific circumstances in which a judge must disqualify himself from presiding over a case. The statute does not require recusal where the father of the judge's law clerk is a partner in the firm representing one of the parties. That such a law clerk can "become the judge," thereby requiring recusal, is supported by neither the language of the statute nor the case law developed thereunder.[7]

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[7] The cases cited by petitioners do not address the issue of whether a law clerk can "become the judge" and therefore do not support

Moreover, petitioners' assertion that the law clerk decided whether there were genuine issues of material fact and that Judge Lynne accepted his conclusions without analyzing the record himself is belied by the district court's statement in its opinion that the clerk, after reviewing the record, discussed with the judge how the law should be applied to undisputed facts. Finally, the implication that Judge Lynne merely signed off on a memorandum opinion written by the clerk without independent analysis and concurrence is a serious allegation which again has no basis in fact, and which indeed is contradicted by the court's

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petitioners' assertion that a law clerk can become a judge's "alter ego" in violation of § 455(b). One of these cases, Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983), was decided under § 455(a), not § 455(b). Moreover, as stated supra, pp. 10-11, the cases do not support the proposition that the harmless error doctrine is inapplicable to cases under § 455(b).

announcement -- made two years before the law clerk joined the court's staff -- that it tentatively had decided to grant defendants' motion for summary judgment. Petitioners' assertions regarding § 455(b)(5)(iii) are baseless and should be disregarded as such.

III. Petitioners' State Law Fraud Claims Against the Company are Preempted under the National Labor Relations Act.

Under San Diego Building and Trades Council v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959):

> When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Petitioners do not contest the Eleventh Circuit's determination that their state law fraud claims are "arguably subject" to the Act and therefore preempted.[8] Rather they argue their claims fall within one of the three exceptions recognized in Garmon. The exception that applies "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in

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[8] Petitioners' attempts to distinguish Serrano v. Jones and Laughlin Steel Co., 790 F.2d 1279 (6th Cir. 1986), are unconvincing. In Serrano, Jones and Laughlin Steel Co. ("J & L") negotiated a concession agreement with the Union in order to avoid a shutdown of one of its coke plants. Despite the concession agreement, J & L closed the plant down. The employees filed suit charging, in part, several state law fraud claims based upon defendant's alleged misrepresentations that it would modernize its coke facilities if the Union agreed to certain concessions. As noted by the Eleventh Circuit below, the Serrano Court was presented the same arguments as were presented by petitioners in this case, and the court correctly held that the fraud claims were preempted. Petitioners' statement that Serrano is distinguishable from this case because the plaintiffs in Serrano were "strike breakers" is a misstatement of facts in Serrano.

the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act," the petitioners argue, applies to state law claims of fraud and breach of contract under Belknap, Inc. v. Hale, 436 U.S. 491, 103 S.Ct. 3172, 77 L.Ed.2d 793 (1983).

In Belknap, this Court recognized a fraud and breach of contract exception for "strike breakers" or "permanent replacements" who were first hired by the employer to replace striking employees, and then fired by the employer after the employer settled an unfair labor practice charge with the union initiating the strike. Noting that the replacements were not union members and therefore their rights would not have been the focus of proceedings on an unfair labor practice charge, the court held their

fraud and breach of contract claims were not arguably subject to the National Labor Relations Act and therefore were not preempted. Further, the court noted the state had an interest in protecting the permanent replacements because the Labor Board would not have protected them.

By contrast, matters are significantly different in this case. Here, it is the employees themselves who are suing the Company for fraud, and the Eleventh Circuit properly found the fraud claims were preempted.[9]

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[9] Petitioners cite Linn v. United Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), for the proposition the state has a Garmon exception interest in seeing that a remedy is provided for a large group of its citizens who have been defrauded. Linn involved an action by a company manager for defamation in the course of a labor organization campaign. This Court held the exercise of state jurisdiction in such an action would be a "merely peripheral concern of the Labor Management Relations Act," and held the defamation claim was not preempted. 383 U.S.

IV. Plaintiffs' State Law Fraud Claims Against The Company Are Barred By The Arbitration Award.

Separate and apart from the fact that plaintiffs' state law fraud claims are preempted under §§ 7 and 8 of the Labor Act, the Eleventh Circuit also correctly concluded that plaintiffs' claims are barred by the arbitration award. This is buttressed by plaintiffs' failure to take issue in their petition with this aspect of the Eleventh Circuit's holding.

The collective bargaining agreement in this case contained a mechanism for the exclusive adjustments of grievances and complaints thereunder. Specifically,

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at 61, 86 S.Ct. at 662. This holding is inapplicable to this case, where the fraud claims are based upon negotiations which are undeniably subject to the National Labor Relations Board's jurisdiction, and indeed are practically indistinguishable from the unfair labor practice charges presented by petitioners to the Board.

it was stated at § 9C of the agreement as follows:

> Should differences arise between the Company and the Union as to the interpretation or application of or compliance with the provisions of this Agreement or as to any question relating to the wages, hours of work, and other conditions of employment or any change therein . . . an earnest effort shall be made to settle the matter promptly in accordance with the following procedure. . . . [Emphasis added].

This Court has long held that clauses such as the foregoing should be read with a "presumption of arbitrability," and that "[d]oubt should be resolved in favor of coverage." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). This presumption, coupled with the facts that (i) the Company and the Union in fact arbitrated numerous disputes over the effects of the plant

closing and (ii) Connors issued checks totaling $243,932.66 to 583 former bargaining unit members based upon the arbitrator's findings, provided ample justification for the court's following Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986). In Mason, the Eleventh Circuit, in a very similar situation, held that employees were required to submit "arguably extrinsic claims, such as fraud, to the grievance and arbitration process." Id. at 1223.

Accordingly, apart from the issue of preemption under the Labor Act, plaintiff's claims of fraud against the Company were properly held to have been merged into and barred by the arbitration award.

V. The District Court Correctly Granted Summary Judgment of Plaintiffs' Hybrid § 301/Fair Representation Claims.

Plaintiffs, at pp. 25-29 of their petition, argue that the District Court improperly granted summary judgment in favor of the Union and the Company on plaintiffs' hybrid § 301/fair representation claims. Aside from the fact that the District Court's decision, and the Eleventh Circuit's affirmance of that decision, are correct and fully consistent with the precedent of this Court and the Eleventh Circuit, all of the arguments made by plaintiffs against this aspect of the district court's decision concern the actions of the Union during the negotiation and ratification of the two concession agreements. Thus, no lengthy response as to these matters is necessary nor shall any be forthcoming from the Company.

At p. 25-26 of their petition, plaintiffs argue that the hybrid § 301/breach of contract claim is not preempted under the Labor Act. No contention was made below, nor did the Eleventh Circuit hold, that such claims were preempted. The district court found (and the Eleventh Circuit affirmed this finding) that there was no genuine issue of material fact with respect to the question whether the Union breached its duty of fair representation in the negotiation or ratification of the concession agreements. Nor was any evidence produced showing that the Union breached its duty of fair representation in connection with the grievances submitted to arbitration in October of 1983.

The Eleventh Circuit's application of the law to the undisputed facts in the

record concerning the union's actions during the negotiation and ratification of the concession agreements was thorough, well reasoned, and sound. The Eleventh Circuit's opinion is thus not appropriate for review on certiorari.

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